IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

ERIE INSURANCE PROPERTY & CASUALTY COMPANY, INC.,	)	Civil Action No.
Plaintiff,	)	
vs.	)	
CRAIG A. EDMOND, JANET EDMOND, DREAMLAND DEVELOPMENT, LLC, d/b/a PLEASANT DAY SCHOOLS, LATASHA HENRY, DONNA CALANDRELLA, CRYSTAL SMITH and CHRISTINA HATCHER McGERVEY,	)	**JURY TRIAL DEMANDED**
Defendants.	)	

COMPLAINT FOR DECLARATORY JUDGMENT

NOW COMES the Plaintiff, Erie Insurance Property & Casualty Company, Inc., by counsel, and for its Complaint for Declaratory Judgment against Defendants, states as follows:

INTRODUCTION

1. This Complaint for Declaratory Judgment is filed pursuant to F.R.C.P. 57 and the Declaratory Judgment Act, Title 28 U.S.C.S. §§ 2201, 2202, *et seq.*

2. This Plaintiff in this Complaint for Declaratory Judgment, Erie Insurance Property & Casualty Company (hereinafter sometimes referred to as "Erie"), is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, registered to transact business within the State of West Virginia, and with its principal place of business in 100 Erie Insurance Place, Erie, Pennsylvania 16530.

JURISDICTION

3. This Court has jurisdiction of the subject matter raised in this Complaint pursuant to Title 28 U.S.C.S. §§ 1331, 1332, 1337 and 1345.

VENUE

4. The matters alleged in this action arose in the Northern District of West Virginia. Accordingly, venue is proper in this judicial district pursuant to Title 28 U.S.C.S. § 1391.

STATEMENT OF THE CASE

5. An action was commenced on or about August 1, 2008, in a case styled *Latasha Henry, Donna Calandrella, Crystal Smith and Christina Hatcher McGervey, Plaintiffs, vs. Craig A. Edmond, Janet Edmond and Dreamland Development, LLC, d/b/a Pleasant Day Schools, Defendant*s, in the Circuit Court of Monongalia County, West Virginia, at Civil Action Number 08-C-547. *See,* Underlying Complaint, attached as Exhibit A. The Underlying Complaint, filed by Latasha Henry, Donna Calandrella, Crystal Smith and Christina Hatcher McGervey (hereinafter sometimes referred to collectively as "Underlying Plaintiffs"), alleges eleven (11) separate causes of action against Craig A. Edmond, Janet Edmond and Dreamland Development, LLC d/b/a Pleasant Day Schools (referred to collectively as "Underlying Defendants"). The Underlying Plaintiffs, each of whom was previously employed by Dreamland Development, LLC, d/b/a Pleasant Day Schools ("Pleasant Day Schools"), allege the following causes of action: (1) Hostile Environment/Sexual Harassment, (2) Intentional Infliction of Emotional Distress, (3) Negligent Infliction of Emotional Distress, (4) Assault, (5) Battery, (6) False Imprisonment, and (7) Invasion of Privacy. Underlying Plaintiffs, Latasha Henry and Donna Calandrella, also allege causes of action for (8) Retaliatory Discharge and (9) Wrongful Discharge in Violation of Public Policy. Underlying Plaintiff, Donna Calandrella, asserts a cause

of action for (10) Breach of Contract and (11) Violation of the Wage Payment and Collection Act. Finally, all Underlying Plaintiffs request punitive, or exemplary, damages from Underlying Defendants.

6. At all times relevant, Pleasant Day Schools, a limited liability corporation, was insured by Erie Insurance Property & Casualty Company Ultraflex Package Policy #Q39-8050037W ("the Policy").

7. Underlying Defendants have made a demand for coverage, indemnification and a defense under said Policy, as to the allegations within the Underlying Complaint filed in the Circuit Court of Monongalia County, West Virginia, at Civil Action Number 08-C-547.

8. Thus, a case in controversy is currently pending before this Honorable Court, over which this Court has both jurisdiction and venue to determine the rights, responsibilities and duties of Erie with respect to its Policy #Q39-8050037W issued to Pleasant Day Schools under which Underlying Defendants claim coverage, indemnification and a right to a defense.

9. Plaintiff herein now seeks a declaratory judgment and determination by this Court that Erie's Policy #Q39-8050037W issued to Pleasant Day Schools does not provide any benefits, coverage or duty to defend or indemnify for Underlying Defendants against the claims asserted by Underlying Plaintiffs in Civil Action Number 08-C-547, filed in the Circuit Court of Monongalia County, West Virginia.

COUNT I

COVERAGE FOR EMPLOYMENT-RELATED PRACTICES ARE EXCLUDED FROM COVERAGE UNDER THE POLICY

10. Plaintiff incorporates as though fully set forth herein the allegations contained in Paragraphs 1 through 9, inclusive, of this Complaint for Declaratory Judgment as if fully set forth herein.

11. Endorsement CG2147 (Ed.7/98) UF-9680 of the Commercial General Liability Coverage Form, CG 0001 (Ed. 10/01), UF-9708 ("CGL"), entitled *Employment-Related Practices Exclusion*, excludes coverage for bodily injury and property damage liability, as well as personal and advertising injury liability as follows:

1. The following exclusion is added to **Paragraph 2, Exclusions of Section I – Coverage A – Bodily Injury and Property Damage Liability:**

   This insurance does not apply to:

   "Bodily injury" to:

   a. A person arising out of any:

      1) Refusal to employ that person;

      2) Termination of that person's employment; or

      3) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination directed at that person; or

   b. The spouse, child, parent, brother or sister of that person as a consequence of "bodily injury" to that person at whom any of the employment-related practices described in Paragraphs 1, 2 or 3 above is directed.

   This exclusion applies:

   a. Whether the insured may be liable as an employer or in any other capacity; and

   b. To any obligation to share damages with or repay someone else who must pay damages because of the injury.

2. The following exclusion is added to **Paragraph 2, Exclusions of Section I – Coverage B – Personal Injury and Advertising Injury Liability:**

   This insurance does not apply to:

   "Personal and advertising injury" to:

   a. A person arising out of any:

      1) Refusal to employ that person;

      2) Termination of that person's employment; or

      3) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination directed at that person; or

b. The spouse, child, parent, brother or sister of that person as a consequence of "personal and advertising injury" to that person at whom any of the employment-related practices described in Paragraphs 1, 2 or 3 above is directed.

This exclusion applies:

a. Whether the insured may be liable as an employer or in any other capacity; and

b. To any obligation to share damages with or repay someone else who must pay damages because of the injury.

12. CGL Coverage §I(A)(2)(e), entitled *Employer's Liability*, excludes coverage for "bodily injury" to an employee of the insured arising out of and in the course of employment by the insured or performing duties related to the conduct of the insured's business.

13. Section I(2)(f)(2), entitled *Violation of the Law*, of the *Limited Employers Liability Coverage Form*, UL-DIWV (Ed. 2/07), UF-3687 of the CGL Coverage, excludes coverage for damages arising out of the discharge of, coercion of, or discrimination against any employee in violation of law.

14. Section I(2)(j) of the *Limited Employers Liability Coverage* of the CGL Coverage also excludes coverage for employment-related practices as follows:

2. **Exclusions**

This insurance does not apply to:

. . .

j. **Employment-Related Practices**

Bodily injury to:

(1) An employee arising out of any:

. . .

(b) Termination of that employee's employment; or

(c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination directed at that employee....

15. Exclusion A(2)(j), entitled *Employment-Related Practices*, of *Employee Benefits Liability Coverage Endorsement* of the CGL Coverage, does not afford coverage for "Damages

arising out of wrongful termination of employment, discrimination, or other employment-related practices."

16. In Count One (*Hostile Work Environment/Sexual Harassment*) of the Underlying Complaint, Underlying Plaintiffs allege they were subjected to "…unlawful sex discrimination during the course of their employment with Pleasant Day Schools.

17. In Count Two (*Retaliatory Discharge*) of the Underlying Complaint, Underlying Plaintiffs, Latasha Henry and Donna Calandrella, allege retaliatory discharge due to their engaging in a "protected activity" under the West Virginia Human Rights Act.

18. In Count Three (*Wrongful Termination in Violation of Public Policy*) of the Underlying Complaint, Underlying Plaintiffs, Latasha Henry and Donna Calandrella, allege wrongful discharge after reporting to law enforcement that Craig A. Edmond's conduct was "criminal and constitutes the crimes of assault, battery, sexual assault, sexual battery and/or sexual abuse."

19. Count Four (*Intentional Infliction of Emotional Distress*), Count Five (*Negligent Infliction of Emotional Distress*), Count Six (*Assault*), and Count Seven (*Battery*) of the Underlying Complaint allege causes of action arising from and based upon Underlying Defendants' alleged unlawful sexual harassment, retaliatory and/or wrongful discharge as asserted in Counts One, Two and Three, all of which conduct allegedly occurred during the course of Underlying Plaintiffs' course of employment at Pleasant Day Schools.

20. Count Eight (*False Imprisonment*) of the Underlying Complaint alleges that "as a result of and during the course of his employment with and ownership interest in Pleasant Day Schools…," "Craig A. Edmond used words, actions, and conduct, including his physical strength, to overpower, illegally detain and restrain Plaintiffs, against their will, and/or caused

Plaintiffs to be in reasonably apprehension of such restraint and detention and thus subjected Plaintiffs to false imprisonment." Plaintiffs further allege Pleasant Day Schools is also liable for Edmond's conduct.

21. Count Nine (*Invasion of Privacy*) of the Underlying Complaint alleges that during the course of his employment with and ownership of Pleasant Day School, Craig A. Edmond's conduct, as previously described in Counts One, Two, Three, Four, Five, Six, Seven and Eight of the Underlying Complaint, was an unreasonable intrusion upon Underlying Plaintiffs' seclusion, thereby constituting an invasion of their privacy rights.

22. In Count Ten (*Breach of Contract*) of the Underlying Complaint, Underlying Plaintiff Donna Calandrella alleges breach of her employment contract, arising from Craig A. Edmond's reevaluation of her position as Director of Pleasant Day Schools, and his subsequent proposed reduction in her salary, medical benefits, and paid vacation, which upon Calandrella's refusal to accept said reduction in salary and benefits, resulted in the termination of her employment.

23. In Count Eleven (*Wage and Payment Act*) of the Underlying Complaint, Underlying Plaintiff Calandrella asserts Defendants wrongfully withheld fringe benefits following her discharge from employment at Pleasant Day Schools in violation of the West Virginia Wage Payment and Collection Act.

24. Thus, coverage as to the allegations of the Underlying Complaint is not afforded to Underlying Defendants pursuant to those policy provisions and exclusions set forth in Paragraphs 11 through 15, *supra*, for all causes of action and requests for damages arise from wrongful termination, discrimination and/or employment related practices.

COUNT TWO

COVERAGE IS NOT AFFORDED UNDER THE LIABILITY PROVISIONS OF THE POLICY BECAUSE THE UNDERLYING COMPLAINT DOES NOT ALLEGE BODILY INJURY OR PROPERTY DAMAGE

25. Plaintiff incorporates as though fully set forth herein the allegations contained in Paragraphs 1 through 24, inclusive, of this Complaint for Declaratory Judgment as if fully set forth herein.

26. Section I of the CGL Coverage requires "bodily injury" or "property damage" to trigger coverage, providing "This insurance applies to "bodily injury" and "property damage" only if "bodily injury" or "property damage" is caused by an occurrence.

27. The CGL Coverage of the Policy defines *bodily injury* as "bodily injury, sickness or disease sustained by a person, including death from any of these at any time," and *property damage* as "physical injury to tangible property, including all resulting loss of use of that property…" or "loss of use of tangible property that is not physically injured."

28. The benefits provided in the *Limited Employee Liability Coverage* of the CGL Policy apply only for claims for "…bodily injury by accident or bodily injury by disease."

29. With the exception of Counts Ten (*Breach of Contract*) and Eleven (*Wage & Payment Act*), the Underlying Complaint is void of allegations of either "bodily injury" or "property damage,"; instead alleging "Plaintiffs have suffered damages as a result thereof including, but not limited to, severe emotional distress, anxiety, fear, trauma, depression, degradation, humiliation and embarrassment as well as economic losses including loss of past and future wages and benefits." Exhibit A, Paragraphs 30, 38, 45, 51, 57, 63, 70, 75, 79, and Prayer for Relief.

30. In Count Ten (*Breach of Contract*) and Count Eleven (*Wage & Payment Act*), Underlying Plaintiff Calandrella does not assert "bodily injury;" instead she alleges having "suffered damages" as a result of her discharge and alleged wrongful withholding of various fringe benefits. *Id.* at Paragraphs 92, 96.

31. Because the Underlying Complaint fails to allege the requisite "bodily injury" or "property damage" necessary to trigger coverage pursuant to CGL Coverage (Section I) or the Limited Employer Liability and Employee Benefits Liability Coverages of the Policy, coverage is not afforded as to the allegations of the Underlying Complaint.

COUNT THREE

COVERAGE IS NOT PROVIDED AS TO THE ALLEGATIONS OF THE UNDERLYING COMPLAINT BECAUSE THE POLICY REQUIRES AN *OCCURRENCE* TO TRIGGER COVERAGE

32. Plaintiff incorporates as though fully set forth herein the allegations contained in Paragraphs 1 through 31, inclusive, of this Complaint for Declaratory Judgment as if fully set forth herein.

33. CGL Coverage (A)(1) applies to "bodily injury" or "property damage," only if the bodily injury or property damage is caused by an *occurrence* that takes place in the "coverage territory."

34. Section V of the CGL Coverage defines *occurrence* as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

35. *Limited Employers Liability Coverage* §I(1) provides coverage applies "…only to bodily injury by accident or bodily injury by disease."

36. Counts One (*Hostile Environment/Sexual Harassment*), Two (*Wrongful Discharge*), Three (*Retaliatory Discharge*), Four (*Intentional Infliction of Emotional Distress*),

Five (*Negligent Infliction of Emotional Distress*), Six (*Assault*), Seven (*Battery*), Eight(*False Imprisonment*), and Nine (*Invasion of Privacy*) do not allege accidental events.

37. Because the causes of action pled in Counts One through Nine of the Underlying Complaint do not come within the ambit of "occurrence" as defined within the CGL liability coverage nor arise by accident as required under the *Limited Employers Liability Coverage*, coverage is not provided under said provisions of the Policy.

38. In Count Ten of the Underlying Complaint (*Breach of Contract*), Calandrella alleges her termination by the Underlying Defendants was in complete disregard and in violation of her Employment Agreement.

39. Underlying Plaintiff Calandrella alleges in Count Eleven that subsequent to her discharge from employment, Underlying Defendants "knowingly" withheld various benefits owed pursuant to West Virginia's Wage Payment & Collection Act.

40. Neither Count Ten nor Count Eleven of the Underlying Complaint allege an "occurrence" and/or accident necessary to trigger coverage under CGL Coverage A or the *Limited Employer Liability Coverage*.

41. Wherefore, coverage is not provided under CGL Coverage A or the *Limited Employer Liability Coverage* as to any of the causes of action in the Underlying Complaint, for none allege an *occurrence* and/or accident necessary to trigger coverage.

COUNT FOUR

COVERAGE FOR BODILY INJURIES WHICH WERE EXPECTED OR INTENDED IS EXCLUDED UNDER THE LIABILITY COVERAGES OF THE POLICY

42. Plaintiff incorporates as though fully set forth herein the allegations contained in Paragraphs 1 through 41, inclusive, of this Complaint for Declaratory Judgment as if fully set forth herein.

43. CGL §I(A)(2)(a) of the Policy excludes coverage for "bodily injury" and "property damage," which is expected or intended:

> 2. **Exclusions**
>
> This insurance does not apply to:
>
> a. **Expected or Intended Injury**
>
> "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

44. Similarly, Section I(2)(a) of the *Limited Employee Liability Coverage* excludes coverage for expected or intended injury:

> 2. **Exclusions**
>
> This insurance does not apply to:
>
> a. **Expected or Intended Injury**
>
> Bodily injury to an employee intentionally caused or aggravated by the insured, including but not limited to, bodily injury to an employee resulting from an act that is determined to have been committed by an insured with the deliberate intent to produce injury.
>
> This exclusion does not apply if the insured's legal liability for an act committed with the deliberate intent to injury is proven by all five of the following facts:
>
> (1) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;
>
> (2) That the insured, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition;
>
> (3) That the specific unsafe working condition was a violation of a state or federal safety statute, rule, or regulation....
>
> (4) That notwithstanding the existence of the facts set for in paragraph (1) thru (3), inclusive of this paragraph, the insured nevertheless intentionally thereafter exposed an employee to the specific unsafe working condition; and
>
> (5) That the employee was exposed suffered serious compensable injury or compensable death as defined in *W.Va. Code* 23-4-1, whether a claim for benefits under Chapter 23 of the W.Va. Code is filed or not as a direct and proximate result of the specific unsafe working condition.

45. The *Employee Benefits Liability Coverage Endorsement* to the CGL Coverage does not afford coverage for expected or intended injuries, instead providing coverage for acts, errors or omissions "negligently committed" in the administration of an employee benefit program.

46. Coverage is excluded as to Count One (*Sexual Harassment/Hostile Work Environment*) of the Underlying Complaint because said cause of action is based upon intentional acts and, therefore, comes within the ambit of the Policy's exclusion for intended or expected injury.

47. In Counts Two (*Retaliatory Discharge*) and Three (*Wrongful Discharge in Violation of Public Policy*) of the Underlying Complaint, Underlying Plaintiffs, Henry and Calandrella, allege unlawful discharge from employment after engaging in activities protected under the W. Va. Human Right's Act, including complaining of the Edmonds' discriminatory and sexually harassing practices and their reporting of Craig A. Edmond's criminal conduct, constituting crimes of assault, battery, sexual assault, sexual battery and/or sexual abuse to law enforcement.

48. Because Counts Two and Three of the Underlying Complaint allege intentional or expected injuries, coverage is excluded pursuant to CGL §I(A)(2)(a), Section I(2)(a) of the *Limited Employee Liability Coverage*, and the *Employee Benefits Liability Coverage Endorsement.*

49. Coverage is not provided pursuant to CGL §I(A)(2)(a), Section I(2)(a) of the *Limited Employee Liability Coverage* and the *Employee Benefits Liability Coverage Endorsement* because Count Four (*Intentional Infliction of Emotion Distress/Outrageous Conduct*) alleges an expected or intended injury, stating "Defendants Janet Edmond and Craig A.

Edmond, as supervisors and managers of Plaintiffs, caused, contributed to or acquiesced in the intentional or reckless infliction of emotional distress upon the Plaintiffs, therefore, such conduct is attributed to the principal or employer…"

50. Coverage as to claims for negligent infliction of emotional distress, as alleged in Count Five of the Underlying Complaint, are excluded pursuant to the Policy's intentional acts exclusions.

51. Similarly, causes of action for assault and battery (Counts Six and Seven) are based upon intentional conduct; therefore, coverage is excluded pursuant to CGL §I(A)(2)(a), Section I(2)(a) of the *Limited Employee Liability Coverage* and the *Employee Benefits Liability Coverage Endorsement*.

52. The allegations of Count Eight (*False Imprisonment*), asserting that during the course of his employment with Pleasant Day Schools, Craig A. Edmond used words, actions and conduct, including his physical strength, to overpower, illegally detain, and restrain Underlying Plaintiffs, allege acts not only inextricably intertwined with the allegations of sexual harassment, battery, and assault, but also acts which do not occur by accident. As such, they are based upon intentional conduct.

53. Count Nine of the Underlying Complaint (*Invasion of Privacy*) alleges Craig A. Edmond's unreasonable intrusion upon the seclusion of Underlying Plaintiffs constituted an invasion of their privacy rights; because said cause of action is inextricably intertwined with the allegations of sexual misconduct and is based upon an intentional act, coverage is excluded.

54. Count Ten of the Underlying Complaint (*Breach of Contract*) which alleges Underlying Defendants breached Calandrella's employment contract by improperly reducing her salary and benefits and upon her refusal to accept such reductions, unlawfully terminating her

contract, alleges a cause of action based upon intentional injury and is, therefore, excluded from coverage.

55. Count Eleven of the Underlying Complaint (*Wage Payment and Collection Act*), which avers Craig and Janet Edmond "knowingly withheld [Calandrella's] fringe benefits" in violation of *W.Va. Code* §21-5-1, *et seq*., is excluded from coverage pursuant to the Policy's exclusions for intentional or expected acts.

56. Wherefore, coverage is not provided under the Policy.

COUNT FIVE

COVERAGE IS NOT TRIGGERED AS TO THE ALLEGATIONS OF THE UNDERLYING COMPLAINT PURSUANT TO THE COVERAGE FOR PERSONAL INJURY WITHIN THE POLICY

57. Plaintiff incorporates as though fully set forth herein the allegations contained in Paragraphs 1 through 56, inclusive, of this Complaint for Declaratory Judgment as if fully set forth herein.

58. CGL Coverage B, entitled *Personal and Advertising Injury*, provides:

1. **Insuring Agreement**

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies.... However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. But:

...

b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

59. Section V(14) of the CGL Coverage defines "personal and advertising injury" as:

"Personal and advertising injury" means injury, including consequential "bodily injury," arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;

...

d. Oral or written publication, in any manner, of material that violates a person's right to privacy....

60. In relevant part, CGL Coverage B(2) excludes coverage for "personal and advertising injury" as follows:

> 2. **Exclusions**
>
> This insurance does not apply to:
>
> a. **Knowing Violation of Rights of Another**
>
> "Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury."
>
> ...
>
> d. **Criminal Acts**
>
> "Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.
>
> ...
>
> f. **Breach of Contract**
>
> "Personal and advertising injury" arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement"....

61. The *Employment-Related Practices Endorsement* further modifies the CGL coverage for "personal and advertising injury," specifically excluding coverage for "personal injuries," arising out of employment-related practices, including but not limited to termination of employment, harassment, coercion, humiliation or discrimination.

62. Because all of the causes of action alleged in the Underlying Complaint arise out of employment-related practices, coverage is not afforded to Underlying Defendants pursuant to the exclusions of *Employment-Related Practices Endorsement,* which excludes coverage for personal injuries arising from employment-related practices.

63. Because Underlying Plaintiffs' causes of action and ensuing damages are alleged to have arisen out of and caused by the sexual harassment, the intent of Underlying Defendants to cause some injury will be inferred as a matter of law; therefore, coverage is excluded pursuant to CGL §B(2)(a), excluding coverage for personal injury "...caused by or at the direction of the

insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury."

64. In Count Three (*Wrongful Discharge*), Underlying Plaintiffs, Henry and Calandrella, asserts Craig A. Edmond's conduct was criminal, constituting the crimes of assault, battery, sexual assault, sexual battery, and/or sexual abuse, all of which were reported to police officials.

65. CGL Coverage B(2)(d) excludes coverage for "personal injury" which arises "…out of a criminal act committed by or at the direction of the insured."

66. Wherefore, coverage is not provided under the Policy as to the causes of action in the Underlying Complaint, for, according to the allegations of the Underlying Complaint, each arose out of criminal acts and are, therefore, excluded from coverage pursuant to CGL Coverage B(2)(d).

COUNT SIX

COVERAGE IS NOT AFFORDED UNDER THE EMPLOYEE BENEFITS LIABILITY COVERAGE

67. Plaintiff incorporates as though fully set forth herein the allegations contained in Paragraphs 1 through 66, inclusive, of this Complaint for Declaratory Judgment as if fully set forth herein.

68. In relevant part, CGL Endorsement, entitled *Employee Benefits Liability Coverage*, provided coverage for sums an insured is obligated to pay as damages as follows:

> b. This insurance applies to damages only if:
>
> (1) The act, error or omission, is negligently committed in the "administration of your "employment benefit program";….

69. In relevant parts, said *Employee Benefits Liability Coverage Endorsement* defines (1) *employee* as a person actively or formerly employed, (2) "administration" as continuing or

terminating any employee's participation in any benefit included in the "employee benefit program," and (3) "employee benefit program" as a program providing some or all of the following benefits: (a) group life, health, or dental plans and flexible spending accounts, (b) profit sharing plans, employee savings plans, stock ownership plans, pension and stock subscription plans, (c) unemployment insurance, social security benefits, and disability benefits, and (d) vacation plans, leave of absence programs, maternity, family, and civil leave, and (e) any other similar benefits designated in the Schedule or added thereto by endorsement.

70. *Employee Benefits Liability Coverage* A(2) excludes coverage as follows:

> 2. **Exclusions**
>
> This insurance does not apply to:
>
> a. **Dishonest, Fraudulent, Criminal or Malicious Act**
>
> Damages arising out of any intentional, dishonest, fraudulent, criminal or malicious act, error or omission, committed by any insured, including the willful or reckless violation of any statute.
>
> b. **Bodily Injury, Property Damage, or Person And Advertising Injury**
>
> "Bodily injury", "property damage" or "personal and advertising injury."
>
> c. **Failure to Perform a Contract**
>
> Damages arising out of failure of performance of contract by any insurer.
>
> . . .
>
> j. **Employment-Related Practices**
>
> Damages arising out of wrongful termination of employment, discrimination, or other employment-related practices.

71. Coverage is not provided under the *Employee Benefits Liability Coverage* for Count Ten (*Breach of Contract*) of the Underlying Complaint pursuant Exclusion (2)(c), which excludes coverage for breach of contract.

72. Count Eleven (*Wage Payment & Collection*) of the Underlying Complaint alleges Underlying Defendants "wrongfully" and "knowingly" withheld Calandrella's fringe benefits following her discharge from employment.

73. Wherefore, coverage is not afforded to Underlying Defendants as to Count Eleven of the Underlying Complaint pursuant to the *Employee Benefits Liability Coverage* A(1)(b)(1) and Exclusion §A(I)(2)(a), for coverage is only provided for negligent acts, errors, or omissions, not intentional acts as alleged in the Underlying Complaint.

74. Additionally, coverage as to all causes of action in the Underlying Complaint are not triggered under the *Employee Benefits Liability Coverage*, for said Endorsement specifically excludes coverage for "bodily injury," "property damage" or "personal and advertising injury" in Exclusion §A(I)(2)(b).

COUNT SEVEN

COVERAGE FOR PUNITIVE DAMAGES IS EXCLUDED UNDER THE LIMITED EMPLOYERS LIABILITY COVERAGE

75. Plaintiff incorporates as though fully set forth herein the allegations contained in Paragraphs 1 through 74, inclusive, of this Complaint for Declaratory Judgment as if fully set forth herein.

76. Alternatively, punitive or exemplary damages are excluded from coverage for any liability covered under the *Limited Employers Liability Coverage*.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff, Erie Insurance Property & Casualty Company, requests declaratory relief pursuant to the provisions of Title 28 U.S.C.S. §§2201, 2202, and Rule 57 of the F.R.C.P. and further respectfully requests this Honorable Court to declare that Erie Insurance Property & Casualty Company has no duty to defend and no duty to provide any benefits, indemnification or coverage pursuant to the policy of insurance issued by Erie Insurance Property & Casualty Company to Dreamland Development, LLC, d/b/a Pleasant Day Schools, further identified as Erie's Ultraflex Package Policy #Q39-8050037W for any losses or damages for which Dreamland Development, LLC, d/b/a Pleasant Day Schools, Craig A. Edmond or Janet Edmond may be liable in the litigation now pending in the Circuit Court of Monongalia County, West Virginia, further identified as Civil Action No. 08-C-54. Plaintiff also requests an award of its costs and expenses, including reasonable attorney fees, and all other relief this Honorable Court deems proper.

Respectfully submitted,

By: ______________________________

P. Joseph Craycraft, Esquire (WV 7920)
SWARTZ CAMPBELL, LLC
1224 Chapline Street, 2nd Floor
Wheeling, WV 26003
P: (304) 232-2790; F: (304) 232-2659

Edward A. Smallwood, Esquire (WV 7657)
SWARTZ CAMPBELL, LLC
4750 U. S. Steel Tower
600 Grant Street
Pittsburgh, PA 15219
P: (412) 232-9800; F: (412) 471-1106

Counsel for Plaintiff